



---

Volume 66 | Issue 2

Article 3

---

February 1964

# Some Conflict of Laws Problems Relating to Negotiable Instruments

William O. Morris

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Banking and Finance Law Commons](#), and the [Conflict of Laws Commons](#)

---

## Recommended Citation

William O. Morris, *Some Conflict of Laws Problems Relating to Negotiable Instruments*, 66 W. Va. L. Rev. (1964).

Available at: <https://researchrepository.wvu.edu/wvlr/vol66/iss2/3>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## Some Conflict of Laws Problems Relating to Negotiable Instruments

WILLIAM O. MORRIS\*

In instances in which a negotiable instrument has circulated in two or more jurisdictions courts have had some difficulty in determining whether to apply the laws of one jurisdiction or the other in determining whether the complaining party had in fact obtained title to the instrument, and in determining the rights and liabilities of the parties in respect to the instrument. If an instrument, by its terms, discloses that it was drawn and was payable in the same jurisdiction in which the instrument was transferred, the courts are not faced with a conflict of laws problem for clearly the laws of only one jurisdiction could be involved. However, in instances where the transfer of the instrument occurred in a jurisdiction other than that in which it was by its terms drawn and payable or where it was drawn in one jurisdiction, payable in a second jurisdiction and transferred in a third jurisdiction, the courts may well be faced with the problem of determining whether to apply the laws of the first, second or even the third jurisdiction in order to determine the rights and liabilities of the parties who have in some capacity been associated with the instrument. It is the intended purpose of this article to consider certain of the conflict of laws problems which courts in the past have with some degree of success resolved.

Because the laws of the several states of the United States relating to negotiable instruments have been similar, and for the most part identical, because of the adoption of the Uniform Negotiable Instruments Act by all the states, the courts in the United States have not been overly concerned with conflict of laws problems with respect to negotiable instruments. Such problems may reasonably be expected to become more common in the future because of the adoption of the Uniform Commercial Code by so many states. There are sufficient differences between the Commercial Code and the Negotiable Instruments Act that conflict of laws problems will become more common. Problems may well be expected to develop in respect to the rights of one who acquired a negotiable instrument in a state which has adopted the Uniform Commercial Code, the instrument having been executed and by its terms payable in a state which is

---

\* Professor of Law, West Virginia University.

still operating under the Uniform Negotiable Instruments Act. By an examination of prior cases we may gain some idea of how various courts will resolve such problems when they arise.

Courts in the United States have on occasion been called upon to resolve certain conflict of laws problems relating to negotiable instruments in which the laws of two or more countries have been involved. It is in this area that we find our most interesting and informative decisions.

#### TITLE TO NEGOTIABLE INSTRUMENTS

With regard to the issue as to whether the party who asserts a claim against a prior indorser of negotiable paper obtained title through the indorsement which had been placed on the instrument in a jurisdiction other than that wherein the instrument had been drawn or had been accepted, it is generally held that the rights of the complainant are to be determined in accordance with the laws of the jurisdiction in which the transfer by the indorsement took place.

In the frequently cited case of *Embiricos v. Anglo-Austrian Bank*<sup>1</sup>, the English court was called upon to determine whether the payee of a check had the right to recover from the defendant who had acquired the instrument on which the indorsement of a prior party had been forged. The plaintiff proceeded against the defendant on the theory that the defendant, not having obtained title to the instrument because of the forged indorsement, had converted the instrument and was therefore liable to the plaintiff as a converter. The check in question was a foreign bill which had been drawn in Romania on a bank in England. It appeared that the indorsement of the special indorsee had been forged in Austria and that the forger had transferred the instrument likewise in Austria to an Austrian bank which in turn had forwarded it to England for collection. By the laws of Austria a good faith purchaser of negotiable paper who had not been negligent in taking the instrument was protected, notwithstanding the fact that an indorsement on the instrument was a forgery. The English court determined that the laws of Austria must be applied in determining whether the defendant had converted the instrument. The court found that by Austrian law the defendant was not guilty of conversion. In other words, one who acquired title in accordance with the laws of the place of transfer could not be deemed a converter thereof.

---

<sup>1</sup> [1905] 1 K. B. 677.

Eight years prior to the *Embircos* case an English court, in the case of *Alcock v. Smith*,<sup>2</sup> determined that an execution sale in Norway of a bill which had been drawn in England upon an English banker and by its terms was payable in England was valid. The execution sale in Norway was to satisfy a private indebtedness of a member of the firm which held title to the instrument. Such practice was permissive by Norwegian law. The purchaser at the execution sale sold the instrument to a resident of Sweden. Another member of the firm sought an injunction to enjoin the acceptor from paying the amount of the instrument to the party in possession of the instrument. The acceptor of the instrument admitted liability on the instrument and paid into court the amount thereof. The English court determined that the Swedish transferee, who had acquired the instrument from the purchaser at the Norway execution sale, had the better right to the money and that the dispute did not involve a question of liability arising out of the bill, but rather the title to the bill as a piece of paper or chattel. Romer, J. stated:

"The effect of sub-sect. 2 of sec. 72 of the Bills of Exchange Act, 1882, . . . is to codify what is laid down in *Lebel v. Tucker* as to the liability of the acceptor to pay only to the indorsee whose title is good, according to English law, in proceedings against the acceptor by such indorsee. But here the acceptor had voluntarily paid, without being sued on the bill for the money, and the case is outside the authorities as to bills of exchange specially."<sup>3</sup>

In an early New York case<sup>4</sup> the court assumed that an indorsee who had acquired a foreign bill could not recover from a prior indorser of the bill where the prior indorsement was void according to both the laws of the place of indorsement and the place where the bill had been drawn even though the indorsement was valid according to the laws of the jurisdiction in which the bill was to be paid. This is a clear recognition that the indorser's liability arises from his contract of indorsement and not from any obligation or duty of the drawer.

In the leading case of *Edgerly v. Busch*,<sup>5</sup> the New York court held that the title of an owner of chattels in New York is not divested by the surreptitious removal of the thing into another state, and the

---

<sup>2</sup> [1892] 1 Ch. 238.

<sup>3</sup> *Id.* at 251.

<sup>4</sup> *Everett v. Vendres*, 19 N. Y. 436 (1859).

<sup>5</sup> 81 N. Y. 199 (1880).

sale of it under different laws. In *Lees v. Harding, Whitman & Co.*<sup>6</sup> a New Jersey court of equity made the following comment: "The rule which looks to the law of the situs has the merit of adopting the law of the jurisdiction which has the actual control of the goods and the merit of certainty."<sup>7</sup> In considering these two different views the New York court in *Weissman v. Banque De Bruxelles*<sup>8</sup> stated:

"The question then arises whether a check, being an evidence of debt merely, has a different situs than tangible personal property. . . . On this point the weight of authority is to the effect that, if the chose in action has assumed the form of a commercial specialty, such as a bill of exchange or promissory note, its transfer is governed by the law of the place of the document at the time of the transfer . . . . The rule of international law, that the validity of a transfer of movable chattels must be governed by the law of the country in which the transfer takes place, applies to the transfer of checks or bills of exchange by indorsement."<sup>9</sup>

The English courts in determining whether the party seeking recovery from the maker of a note or drawer of a bill of exchange has title to the instrument have found it necessary to determine whether they could apply the laws of the place where the instrument had been transferred or the laws of the place where the instrument had been executed. In respect to foreign instruments, those executed in one jurisdiction and payable in another, the English courts have looked to the laws of the jurisdiction wherein the transfer occurred to determine whether the complaining party had in fact acquired title to the instrument by the transfer. If the complaining party had in fact acquired title in accordance with the laws of the jurisdiction in which the transfer occurred, such holder is entitled to recover from the maker or drawer even though he would not have obtained title by the laws of the jurisdiction in which the instrument had been drawn. If by the laws of the jurisdiction in which the transfer occurred, title to the instrument would not have passed to the transferee, but would have passed if the laws of the jurisdiction in which the instrument had been drawn were applied, the possessor of the instrument would be deemed not to have obtained title to the instrument and therefore would not be entitled to recover on the instrument.

<sup>6</sup> 68 N.J.Eq. 622, 60 Atl. 352 (1905).

<sup>7</sup> *Id.* at 629, 60 Atl. at 355.

<sup>8</sup> 254 N. Y. 488, 173 N.E. 835 (1930).

<sup>9</sup> *Id.* at 494, 173 N.E. at 837.

In *Lebel v. Tucker*<sup>10</sup> the plaintiff had obtained a bill which had been drawn and accepted in England through an indorsement made in France. Under French laws, because of certain technical defects, the indorsee did not acquire the right to maintain an action on the instrument in his own name. The indorsement being valid under English laws the plaintiff was permitted to maintain an action on the instrument in his own name. The indorsement being valid under English laws the plaintiff was permitted to maintain an action on the instrument against the acceptor, notwithstanding the fact that the drawer and indorsee were residents of France. Judge Mellor stated: "We have here to interpret the contract, which was made in England, to be performed in England, and we are satisfied that the endorsement need only be such as the contract contemplates. We think that the acceptor in a case like the present undertakes to pay to the payee, or his order, by an endorsement valid according to English law."<sup>11</sup> The laws of England, under the circumstances, cannot be varied by an indorsement made in a country other than where the acceptor became liable upon the instrument. Had the holder derived his title through a forged indorsement, or as in *Alcock v. Smith*<sup>12</sup> through a foreign sale under execution in accordance with the laws of the situs of the sale, but contrary to the laws of the jurisdiction in which the instrument was drawn and payable, the acceptor would have had a valid defense.

Where an instrument is drawn and indorsed in the same jurisdiction and thereafter an action is brought against the acceptor or drawer of the instrument in another jurisdiction, the respective rights of the litigants will be determined in accordance with the laws of the jurisdiction wherein the instrument had been drawn and is payable. In the interesting case of *Trimbey v. Vignier*<sup>13</sup> an action was brought by an indorsee of a promissory note against the maker of a note which had been executed and indorsed in France. As the indorsement was ineffective under French law to pass title to the instrument the holder could not maintain an action thereon in his own name. The indorsement was sufficient to pass title by the laws of England. The English court denied to the plaintiff the right to maintain an action on the note against the maker because the indorsement had been made in France and was governed by French law. The court

---

<sup>10</sup> L.R. 3 Q.B. 77 (1867).

<sup>11</sup> *Id.* at 83.

<sup>12</sup> [1892] 1 Ch. 238.

<sup>13</sup> 1 Bing. (N.C.) 150, 131 Eng. Rep. 1075 (1834).

apparently was of the opinion that the laws of France controlled not only the remedy but also the substance of the contract.

The federal court was called upon to consider a similar problem in *Dundas v. Bowler*.<sup>14</sup> In the *Dundas* case a remote assignee of a negotiable note instituted a suit to foreclose a mortgage given as security for payment of the note. By Ohio law, the place where the note had been executed, an assignment by an insolvent debtor with an intent to prefer one or more creditors over other creditors inured to the benefit of all creditors. The Ohio law was held to be inapplicable to an assignment made in Pennsylvania. By the laws of Pennsylvania the assignment was valid and the assignee acquired the right to collect on the instrument. In the court's opinion the following statement is noted: "The idea that, as the original contract was entered into in Ohio, the assignments, though made in any other state, are governed by the laws of Ohio, is wholly unsustainable . . . . Under the law of Pennsylvania, a debtor may secure by mortgage, or otherwise, some creditors in preference to others; and such is the common law. There is no law in Ohio that can reach or affect the contract of assignment by the bank (assignor) to the complainants."<sup>15</sup>

In respect to foreign bills the courts have generally followed a contrary view in holding that the laws of the place of transfer of the instrument are to be applied in determining whether title passed by the transfer and the rights of the transferee to proceed against any person primarily liable on the instrument or against the drawer of a bill of exchange.<sup>16</sup>

With respect to a bill which had been drawn in Belgium upon an English drawee, accepted by the drawee, which had been indorsed and transferred in Belgium to a predecessor in the plaintiff's chain of title, and which had subsequently been transferred several times in France, the court determined in *Brandlaugh v. De Rin*<sup>17</sup> that since under French law a blank indorsement did not pass such title as to entitle the indorsee to maintain an action in his own name, he could not prevail in an action on the instrument against the drawer in the French court.

<sup>14</sup> 8 Fed. Cas. 30 (No. 4,141) (C.C.S.D. Ohio 1844).

<sup>15</sup> *Id.* at 31.

<sup>16</sup> *Brandlaugh v. De Rin*, L. R. 3 C. P. (Eng.) 538 (1868); *Koechlin v. Kestenbaum Bros.*, [1927] 1 K.B. 889; see also *Haarbleichen v. Baerselman*, 137 L. T. Jo. (Eng.) 564 (1914).

<sup>17</sup> L. R. 3 C. P. (Eng.) 538 (1868). Decision of the majority of the court reversed in L.R. 5 C. P. (Eng.) 473 (1870) because the lower court was in error as to French law.

In *Koechlin v. Kestenbaum Bros.*<sup>18</sup> the plaintiff had obtained an instrument in France and was seeking recovery from an English acceptor. The facts disclosed that the bill had been drawn in France upon the defendant in London. The bill had been sent from France to London where the drawee accepted the bill and returned it to the drawer in France. The drawer did not indorse the instrument in the name of the payee, but in his own name as agent of the payee, and negotiated the bill to the plaintiff. Under French law the agent, if authorized, could indorse his own name without adding thereto the name of his principal. The court felt that as this transaction involved the transfer of movable chattels, the transfer must be governed by the laws of the jurisdiction in which the transfer had occurred. The court applied the laws of France notwithstanding the fact that the indorsement would not have had the effect of passing title by the laws of England. It is noted that since the bill in question was a foreign bill of exchange and since the contract of acceptance is governed by English law, the acceptor's liability will depend upon whether the plaintiff acquired title to the instrument in accordance with the laws of the jurisdiction in which the transfer occurred. The court was of the opinion that section seventy-two of the English Bills of Exchange Act had adopted the view expressed by the court in *Brandlaugh v. De Rin*.<sup>19</sup> With reference to foreign bills the court stated: "It is only requisite that the transfer should be made in accordance with the total law of England, which includes not only the municipal but the law of the foreign country, which is by the law of England, and by the very terms of §72, recognized as being a law which the law of England will itself recognize."<sup>20</sup> The decision in this case was reversed because the lower court was in error as to the French law. Under French law the blank indorsement was ineffective only between the indorser and indorsee. The indorsee would not be prevented from suing the acceptor in his own name in France.<sup>21</sup>

The court in the later case of *Haarbleicher v. Baerselman*,<sup>22</sup> held that the character of an indorsement, whether restrictive or not, and of the legal incidents related thereto, is to be determined by the laws of the jurisdiction where the indorsement was made. In this case the facts disclosed that the bill had been drawn in Germany upon

<sup>18</sup> [1927] 1 K. B. 889.

<sup>19</sup> L. R. 5 C. P. (Eng.) 473 (1870).

<sup>20</sup> *Koechlin v. Kestenbaum Bros.*, [1927] 1 K. B. 889, 899.

<sup>21</sup> *Brandlaugh v. De Rin*, L. R. 5 C. P. (Eng.) 473 (1870).

<sup>22</sup> 137 L. T. Jo. (Eng.) 564 (1914).



an English drawee and indorsed in Germany. It was held that the effect of the indorsement was to be determined by German law.

The opinion in the case of *Re Marseilles Extension Ry. & Land Co.*<sup>23</sup> contains dicta contrary to the prior considered cases in respect to the effect of an indorsement made in another jurisdiction. This case involved an action by the holder of a bill against one who had accepted the bill. The instrument in question was written in French in English form and had been drawn by a Frenchman upon an English drawee who accepted the bill. The drawer had negotiated the instrument in France by a blank indorsement and delivery, which under French law did not have the effect of passing title thereto. The English court determined that the bill in question was in fact an English bill since it was in English form. The court permitted the holder to recover against the acceptor because the court was of the view that the parties intended the bills to be English bills; the effect of the indorsement should therefore be determined in accordance with the laws of England and not of France.

The dicta in *Embiricos v. Anglo-Austrian Bank*<sup>24</sup> infers that if an indorsement in a foreign country is sufficient under the foreign law to pass title to the instrument to the indorsee, such title will be recognized in England as being sufficient to entitle the indorsee to maintain an action thereon against the acceptor or drawer of the bill, notwithstanding the fact that the indorsee would not have acquired such a right had the indorsement been made in England. The court said:

"But it would manifestly be an unsatisfactory state of the law if the legal result is that the indorsement is effective to give the indorsee of a bill a good title as against the payee, but not effective according to English law to give that indorsee a good title against the drawer or the acceptor. And it would be convenient, as well from a legal as well as from a commercial point of view, that it should be established that the title by such indorsement is good against the original parties to a negotiable instrument, having regard to the contractual liability incurred by them thereby . . . . At all events, it has never been decided that the liability of an acceptor in England of a bill drawn abroad, or of the

---

<sup>23</sup> 30 Ch. D. 598 (1885).

<sup>24</sup> [1905] 1 K. B. 677.

drawer of a cheque payable in England amounts to a contract to pay on a forged indorsement valid by the foreign law, but invalid by the law of England. It may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognized by the law of England even though that indorsement is invalid according to what I will call, for convenience, the local law of England."<sup>25</sup>

The distinctions made by the courts in respect to the rights of a transferee of negotiable foreign bills and inland or domestic bills is sound. In respect to an inland or domestic bill the parties did not contemplate that the instrument would pass in foreign commerce but contracted entirely in respect to local law. With respect to instruments which by their terms disclose that they will be moving in foreign commerce the parties must be charged with knowledge of the foreign laws and be deemed to have dealt accordingly.

In the earlier of the two leading cases in which courts of this country have considered the aforementioned problem, the New York court in *Everett v. Vendres*<sup>26</sup> was called upon to consider the rights of the holder in respect to an instrument which had been drawn in New Granada, and by the laws of New Granada the indorsement was void, but by the laws of New York it was valid and sufficient to pass title to the bill. The drawee having dishonored the bill, the indorsee instituted this action against the drawer thereof. The drawer defended on the basis that the indorsement was void under the laws of New Granada. The New York court was of the opinion that the obligation incurred by the indorser would be governed by the laws of New Granada, the place of the indorsement, but the liability of the drawer would be determined by the laws of New York, the place of payment and performance. In determining the liability of the drawer and whether the indorsee had obtained title to the instrument, the court determined these issues by applying the law of the place where the instrument was by its terms payable, that is, New York. The New York court did consider the English case of *Trimbey v. Vignier*<sup>27</sup> and distinguished the *Trimbey* case from the principal case on the basis that the English law was not applied in the *Trimbey* case because it was not the law of the place of payment, the place of payment being the maker's residence in France. The indorsement

<sup>25</sup> *Id.* at 684.

<sup>26</sup> 19 N. Y. 436 (1859).

<sup>27</sup> 1 Bing. (N.C.) 150, 131 Eng. Rep. 1075 (1834).

being defective under the French law, the holder of the instrument could not recover under French law in England even though he could have done so in England if English law had governed. If the New York court had followed the reasoning set forth in prior English cases in deciding the *Everett* case, the bill being a foreign bill, the law of the place of indorsement would have governed irrespective of the fact that the drawer's liability would be governed by the laws of New York because the place of indorsement was the same as that where the bill had been drawn.

In the later case of the *United States v. Guaranty Trust Co.*,<sup>28</sup> decided in the United States Supreme Court in 1934, the validity of title to a check bearing a forged indorsement was considered. The complaint alleges that a check had been mailed to the payee in Yugoslavia; that neither the payee of said check nor any one on his behalf had ever received or indorsed the check; and that some person other than the payee indorsed the check in Yugoslavia. By the laws of Yugoslavia every transferee, if he takes without actual notice of any alleged forgery or other defect, in the absence of fraud or gross negligence, obtains a good title to the instrument, even if the indorsement of the payee is forged. The Court determined that the government, having made the check payable to a resident of Yugoslavia and having mailed it to such payee, must be deemed to have intended that it should be negotiated there according to Yugoslavian law. It was argued without success that since the check was drawn and payable in the District of Columbia, the law of the District of Columbia should prevail. The conclusion of the Court in this case was that the drawee of a bill on which it was also the drawer could not recover the money paid on the instrument even though the payee's indorsement had been forged in Yugoslavia. The indorsement was sufficient to pass title under the law of Yugoslavia.

It may be concluded that as a general proposition, the validity of a transfer of negotiable paper is governed by the law of the place of transfer as to foreign bills of exchange and by the law of the place where the instrument was drawn and payable as to inland or domestic bills of exchange.

In *Briggs v. Latham*<sup>29</sup> the Kansas court was called upon to determine whether an indorser had any liability on certain notes. The notes

---

<sup>28</sup> 293 U.S. 340 (1934).

<sup>29</sup> 36 Kan. 255, 13 Pac. 393 (1887).

were by their terms drawn and payable in Minnesota and were delivered to the defendant in Illinois. The defendant indorsed the notes in Illinois where she placed them in her husband's hands to sell. She did not specify to whom or where the notes were to be sold. The husband while in St. Louis, Missouri, sold and delivered the notes to Dunbar. Under the law of Illinois no protest or notice was necessary to fix the liability of the defendant indorser. However, the laws of both Missouri and Kansas required protest and notice in order to establish the liability of an indorser. The physical act of indorsing the notes in Illinois did not make this an Illinois indorsement. Such act did not pass title to the notes. The indorsement of the note was not completed until the instrument had been delivered to the transferee. It is the delivery of the paper, properly indorsed, which operates as the contract of indorsement. The court stated: "Until that time the notes were in the control of the defendant, and the transfer or contract of indorsement was not completed till then. The indorsement is a separate and substantive contract, and is not necessarily controlled either by the place of payment named in the notes, or by residence of the indorser. The general rule is that contracts of this character are to be construed, and their effect determined, according to the laws of the state in which they are made, unless it appears that they are to be performed in or according to the laws of another state."<sup>30</sup> The contract was in fact made in Missouri, and it cannot be said in view of the facts present that the contract of indorsement was made in contemplation of Illinois law being applied in the event of a subsequent dispute. The court found for the defendant indorser.

Judge Story<sup>31</sup> supposes a case where a negotiable bill of exchange is drawn in Massachusetts, on England, and is indorsed in New York, and again by the first indorsee in Pennsylvania, and by the second in Maryland, and the bill is dishonored, the law relating to damages in these states being different; and the inquiry is made, what rule is to govern with respect to damages? Judge Story answered his question as follows: "The answer is that in each case, the *lex loci contractus*. The drawer is liable on the bill according to the law of the place where the bill was drawn, and the successive indorsers are liable on the

---

<sup>30</sup> *Id.* at 259, 13 Pac. at 396.

<sup>31</sup> STORY, *CONFLICTS OF LAW* § 314 (1872). For cases see: *Smith v. Mead*, 3 Conn. 253 (1830); *Blanchard v. Russell*, 13 Mass. 1 (1816); *Aymar v. Sheldon*, 12 Wend. 439 (1839); *Cook v. Litchfield*, 9 N. Y. 279.

bill according to the law of the place of their indorsement, every indorsement being treated as a new and substantive contract."<sup>32</sup>

In *Belestin v. First Nat'l Bank*,<sup>33</sup> the court denied the right of recovery by the plaintiff purchaser of a bank draft on which the payee's indorsement had been forged against the bank which sold its draft. The facts disclosed that the plaintiff, a resident of Kansas City, Missouri, purchased a bank draft from the defendant payable to his brother who lived in Tripoli, Greece. The payee's indorsement on the draft was drawn by the defendant on a London, England, banking house. The draft had been stolen from the mail and the payee's indorsement forged. The laws of Missouri do not allow the good faith of the drawee banker to discharge him if he pays the bill on a forged indorsement. The issue involved was whether the rights and liabilities of the drawer are to be governed by the law of England, where the bill was payable, or the law of Missouri, where it was drawn. The law of the place of payment governs for the purpose of payment and the incidents of payment.<sup>34</sup> The evidence discloses that the drawee paid and discharged the bill under the law of the place of performance. The Court cited with approval the following statement from *Amsinck v. Rogers*:<sup>35</sup> "Drawer of such a bill does not contract to pay the money in the foreign place on which it is drawn, but only guarantees its acceptance and payment in that place by the drawee, and agrees, in default of such payment, upon due notice, to reimburse the holder in principal and damages at the place where he entered into the contract."<sup>36</sup> It therefore necessarily follows that payment being legal at the place where the drawee made payment the drawer has fulfilled his contractual obligation and is therefore discharged of any liability to the purchaser of the instrument.

The South Dakota court<sup>37</sup> determined that as to indorsements made in South Dakota the formalities necessary to its execution must be determined by the laws of South Dakota. The South Dakota law provided that an indorsement made by an agent is only effective if the agent was duly authorized in writing. Under the laws of Iowa, the state where the agent was appointed, oral authorization to the

<sup>32</sup> STORY, *op. cit. supra* note 31.

<sup>33</sup> 177 Mo.App. 300, 164 S.W. 160 (1914).

<sup>34</sup> Scudder v. Union Nat'l Bank, 91 U.S. 406 (1875).

<sup>35</sup> 189 N. Y. 252, 82 N.E. 134 (1921).

<sup>36</sup> 177 Mo.App. 300, 305, 164 S.W. 160, 161 (1914).

<sup>37</sup> Security Holding Co. v. Christensen, 53 S.D. 37, 219 N.W. 949 (1928); see also 27 MICH. L. REV. 335 (1929); 7 TENN. L. REV. 203 (1929).

agent is sufficient. The agent not being authorized in writing to indorse the instrument, the party in possession could not qualify as a holder in due course of the instrument.

Whether or not the acts of a drawee of a bill of exchange amounted to an acceptance where the instrument was drawn in one state on a drawee in another state is determined by the laws of the state where the drawee undertook to accept the bill. In respect to a bill drawn in Chicago upon a St. Louis, Missouri firm the Court determined in *Scudder v. Union Nat'l Bank*<sup>38</sup> that the validity of the acceptance by a member of the drawee firm while in Chicago, Illinois, was to be determined by the Illinois law. By Illinois law a parol acceptance was valid, but such verbal acceptance was not valid in Missouri. The Court in finding the verbal acceptance to be sufficient to bind the acceptor stated: "Matters bearing upon the execution, the interpretation and validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statute of limitations, depend upon the law of the place where the suit is brought."<sup>39</sup>

#### VALIDITY OF INSTRUMENT

The validity of a check, the scope of the order to pay and the person authorized by the drawer to receive payment are determined by the law of the place where the instrument was executed.

A check executed in Illinois was by its terms payable in New York. By the law of Illinois, the check was bearer paper and could be negotiated by delivery without indorsement, while by the law of New York the instrument was order paper. The New York court was called upon to determine whether the drawer's rights and obligations were to be determined by Illinois or New York law. If the law of Illinois applied, the drawee who had made payment of the instrument might properly debit the drawer's account for the amount of the check while the drawee would not enjoy such right if the New York law applied. Under the New York law the drawee would not have complied with the drawer's order and therefore could not properly debit the drawer's account. The drawer of a bill engages that on due presentment the instrument will be accepted or paid or both

---

<sup>38</sup> 91 U.S. 406 (1875).

<sup>39</sup> *Id.* at 413.

according to its terms, and if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder. In *Swift & Co. v. Bankers Trust Co.*,<sup>40</sup> the New York court in holding for the drawee and against the drawer on the aforementioned facts stated: "Regardless of where the instrument may have been executed or transferred, the parties undoubtedly intended that an order for payment shall be presented and paid according to its tenor at the place therein specified or at the usual place of business or residence of the drawee. Matters connected with presentment, acceptance and payment are to be regulated by the law of that place."<sup>41</sup> It therefore follows that the drawer's engagement to pay if the instrument be dishonored contemplated performance by the drawer at his residence or place of business. From this it follows that the scope of the drawer's order to pay and the person authorized by the drawer to receive payment are fixed at the inception of the instrument and by the law of the place where the instrument was executed, which in this case was Illinois.

The court in *Amsinck v. Rogers*<sup>42</sup> was concerned with a foreign bill of exchange which had been indorsed by the drawers to bankers in New York who in turn forwarded the bill to Vienna for collection. The collecting agent did not make a demand for payment in accord with New York law and likewise neglected to protest the bill after the drawees had refused to make payment as required by New York law. With respect to the contract of the drawer of a bill of exchange the contract is to be regarded as having been made at the place where the bill is drawn, and as to its form and nature and the obligation and effect thereof, is governed by the law of that place in regard to the payee and any subsequent holder.

Prior to the adoption of the Uniform Negotiable Instruments Act the New York court in *Hibernia Nat'l Bank v. Lascombe*<sup>43</sup> treated the obligations of a drawer of a check as being different from the liability of the drawer of a bill of exchange. The court held that the drawer of a check contracts to pay at the place where the check by its terms is payable, instead of, as in the case of the drawer of a bill of exchange at the place where the instrument is drawn. The Negotiable Instruments Act provides that checks are to be treated as bills of exchange in all cases other than those expressly provided for by

---

<sup>40</sup> 280 N.Y. 135, 19 N.E.2d 992 (1939).

<sup>41</sup> *Id.* at 142, 19 N.E.2d at 995.

<sup>42</sup> 189 N.Y. 252, 82 N.E. 134 (1907).

<sup>43</sup> 84 N.Y. 362 (1881).

the Act. The Act makes no provision in this respect. The same law applicable to the drawer of a bill of exchange is by the terms of the Negotiable Instruments Act applicable to the drawer of a check.

#### NEGOTIABILITY OF INSTRUMENT

Section 336 of the Restatement of the Law of Conflict of Laws provides: "The law of the place of contracting determines whether a mercantile instrument is negotiable; whether it is duly executed and delivered; whether it is valid without consideration, and if not, whether consideration had been given." While this position of the Restatement has not been uniformly accepted and has been subjected to severe criticism, it is nevertheless in accord with the decisions of the courts in several cases.<sup>44</sup>

In *Gates v. Fauvre*<sup>45</sup> the court determined that the negotiability of a note was to be determined by the state where payable. The court stated that: "The *lex mercatoria*, the law merchant, is a part of the common law, and governs bills of exchange, . . . but the *lex mercatoria* did not, at common law apply to promissory notes."<sup>46</sup>

It is clear that in respect to notes which by their terms appear to have been executed in a particular jurisdiction, and where there is no allegation to the contrary, it will be presumed that the notes were in fact executed in that jurisdiction.<sup>47</sup> Where the notes are likewise payable in the same jurisdiction it is equally clear that their negotiability must be determined by the laws of that jurisdiction.<sup>48</sup>

#### STATUTE OF LIMITATIONS

The Iowa court, in *Okey v. Bargeholt*,<sup>49</sup> was presented squarely with the issue as to whether to apply the statute of limitations of the state wherein a note was executed or to apply the statute of limitations of the state in which the note by its terms was payable. The facts disclosed that an Iowan drafted a note payable to his order, dating it and making it payable at his home in Iowa, and then mailed it to the maker in Colorado, who in turn signed the note and returned it by mail to the payee. If this note is a Colorado contract it is

---

<sup>44</sup> *Howenstein v. Barnes*, 5 Dill. 482; *Navajo County Bank v. Dolson*, 163 Cal. 485, 126 Pac. 153 (1912).

<sup>45</sup> 74 Ind.App. 382, 119 N.E. 155 (1918).

<sup>46</sup> *Id.* at 400, 119 N.E. at 161.

<sup>47</sup> *Crume v. Brightwell*, 69 Ind.App. 404, 122 N.E. 230 (1919).

<sup>48</sup> *Ibid.*

<sup>49</sup> 236 Iowa 463, 19 N.W.2d 212 (1945).



subject to the defense of the statute of limitations; if on the other hand it is an Iowa contract, the maker does not have the defense of the statute of limitations. It is generally recognized that cases involving contracts entered into by offer and acceptance evidenced by correspondence hold that where the offer is made by letter, the acceptance is effective as soon as the acceptance is mailed to the offeror, and the mailing fixes the place of contract.<sup>50</sup> The court in the *Okey* case thought the principle normally applied to an acceptance of an offer through the same channel or method as transmitted the offer, should not be applied to the facts of the case. For here the payee had drawn the note, dated it and made it payable at the place of his own residence. Under such circumstances the trier of fact might well infer an intention on the part of the parties to make it a contract of the state in which it was payable. The lower court, having directed a verdict for the defendant, was reversed by the appellate court.

Some sixteen years before the decision in the *Okey* case the Iowa court, on facts similar to those set forth in the *Okey* case, applied the statute of limitations of the state where the contract was consummated. In the case of *In re Young*<sup>51</sup> the court was concerned with notes which a resident of Iowa had sent to a resident of Minnesota for signing. The sender gave no direction as to the manner or means of returning the signed notes, however the maker returned them by mail to the Iowa resident. The court ruled that the notes were Iowa contracts and collection was not barred by the shorter Minnesota statute of limitations. The court quoted with approval the following statement from 8 C.J. *Bills and Notes* §335 (1916): "Thus delivery may be made by mail, in which case, if so delivered at the request of the payee, the delivery is completed when the instrument is placed in the mail, although never received. . . . On the other hand, if not so sent at the request of the payee, it seems that the instrument is not delivered until received."<sup>52</sup>

#### CAPACITY TO CONTRACT

In 1912, Mr. and Mrs. Poole jointly executed a negotiable promissory note payable to the order of Perkins. The Pooles resided and were domiciled in Tennessee. After execution of the note but prior

<sup>50</sup> *International Transp. Ass'n v. Des Moines Morris Plan Co.*, 215 Iowa 268, 245 N.W. 244 (1932).

<sup>51</sup> 208 Iowa 1261, 226 N.W. 137 (1929).

<sup>52</sup> *Id.* at 1262, 226 N.W. at 138.

to the institution of this action all parties involved became residents of Virginia. By the law of Tennessee, at the time of the execution of the contract, the contract of a married woman was voidable. The notes were dated, signed and delivered in Tennessee, payable at a bank in Virginia. In *Poole v. Perkins*<sup>53</sup> the court in holding Mrs. Poole liable on the notes stated through Judge Kelly:

"It will be found, too, from an examination of the authorities . . . , that most of them concede that the actual bodily presence of the contracting party is not necessary to make the contract valid according to the laws of some other state than that of the domicile. If, for example, in the instant case Mrs. Poole had delivered the note to Perkins, by mailing or sending it to him in Virginia, then by the clear weight of authority she would have bound herself in accordance with the laws of the state of Virginia as fully as if she had actually crossed the state line and signed and delivered the note in that jurisdiction."

Is the court in fact stating that Mrs. Poole is liable on the note because the delivery of the note was not completed until it was physically delivered in Virginia? It would seem so. However, the court also seems to have based its decision on the fact that it was of the opinion that the parties had contracted with reference to the law of the state in which the note was to be paid. Where a contract, invalid in the state where it is executed because of lack of contractual capacity of the parties, provides for performance in a state whose laws will uphold it, such provision is alone sufficient to evidence an intention to bring the contract within the laws of the latter state; the true criterion as to the governing law being the intention of the parties as to what law shall govern.

Likewise it was held in *Palmer Nat'l Bank v. Van Doren*<sup>54</sup> that the place of making or of performance, rather than of the married woman's domicile, governed her capacity to contract. In this case the notes had been mailed from Michigan to Illinois and were held to be Illinois contracts and enforceable in Michigan, since Illinois law permitted married women in such cases to contract.

In the well reasoned case of *Farm Mortgage & Loan Co. v. Beale*<sup>55</sup> the Nebraska appellate court reversed the lower court and held that

---

<sup>53</sup> 126 Va. 331, 337, 101 S.E. 240, 242 (1919).

<sup>54</sup> 260 Mich. 310, 244 N.W. 485 (1932).

<sup>55</sup> 113 Neb. 293, 202 N.W. 877 (1925).

one Mrs. Beale who had actually signed a note in Nebraska was not liable on the note. From the face of the note it appeared to have been signed in Missouri and to be payable in Missouri. By Missouri law a married woman could contract as though she were a *feme sole*, while by Nebraska law the common law disability of a married woman remained, except to the extent the common law disability had been removed by statute. The court in determining that Mrs. Beale was liable on the note stated: "The great weight of authority is to the effect that, where a promissory note is made in one state, to be performed in another state, it is to be regulated and governed by the law of the place of performance, without regard to the place at which it was written, dated, or signed, unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made."<sup>56</sup>

Attention is also directed to the case of *In re Lucas*.<sup>57</sup> In this case Michigan residents by correspondence solicited a loan from a non-resident and executed and mailed their note in Michigan. The note by its terms was payable in Michigan. The court accordingly held that the note was a Michigan contract, and the wife's liability was to be determined by applying Michigan law.

---

<sup>56</sup> *Id.* at 294, 202 N.W. at 878.

<sup>57</sup> 272 Mich. 1, 261 N.W. 117 (1935).